Supreme Court, U.S.
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No. 00-891

IN THE

Supreme Court of the United States

SHARI M. HICKS,

Petitioner,

v.

LEROY'S JEWELERS, INC.; STERLING, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Should the Court review this case when the question the Petition presents is whether the courts below supplied facts and made erroneous factual findings in deciding a summary judgment motion?

Should the Court review this case when the question the Petition presents is whether under the federal Family and Medical Leave Act an employer may place an employee on leave given that the question is an uncontroverted principle which the lower court found unnecessary to address?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Sterling, Inc., d/b/a LeRoy's Jewelers, is an indirect wholly owned subsidiary of Signet Group plc. which is publicly traded on NASDAQ.

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COUNTER-STATEMENT OF THE CASE

This case involves a primary legal principle under the federal Family and Medical Leave Act of 1993 ("FMLA" or the "Act"), 29 U.S.C. § 2601, *et seq*. The principle is that as a matter of law under the FMLA, an employee is entitled to *only* a total of 12 weeks of leave in a 12 month period. Upon expiration of the 12 weeks of leave, if the employee cannot return to work due to the continuation of a serious health condition, the employee has no right to job restoration or to FMLA protection. 29 U.S.C. § 2612(a)(1); 29 C.F.R. § 825.214(b).

During her employment with Respondent Sterling, Inc. d/b/a LeRoy's Jewelers ("Sterling"), Petitioner Shari M. Hicks ("Hicks") received 12 weeks of FMLA leave, which began on August 8, 1995 and ended on October 31, 1995. Jt. App. 65-66, 74-75, 218-219.[1] When Hicks did not report to work or contact Sterling at the end of her leave, and after several attempts to contact Hicks, which were unsuccessful, Sterling terminated her employment effective November 14, 1995. Jt. App. 70-73, 78. In sworn testimony, Hicks admitted that she received 12 weeks of leave, and that she could not return to work at the end of her leave. Jt. App. 66, 13. As such, under the law Hicks was not entitled to job restoration or any FMLA protection.

As summarized below, the evidence of record demonstrates that Hicks received 12 weeks of leave and could not return to work at the end of her leave. In 1995, while employed by Sterling, Hicks was granted a leave under the

1. All citations to Jt. App. __ are references to the Joint Appendix filed in the United States Court of Appeals for the Sixth Circuit.

FMLA, which commenced on August 8, 1995 (when Hicks informed Sterling that she was hospitalized with a kidney infection) and ended on October 31, 1995. Jt. App. 12, 65-66, 74-75, 103, 218-219. Hicks received a letter dated September 11, 1995 from Sterling verifying that she was on an approved FMLA leave. Jt. App. 293. The letter listed a toll-free telephone number and informed Hicks to contact Sterling with any questions about her FMLA leave. Hicks also signed a "Family and Medical Leave of Absence Advance Notice and Leave Agreement," wherein she agreed to return to work on October 31, 1995. The Leave Agreement states that:

> . . . the rules of the FMLA provide that my leave of absence may not exceed 12 weeks. I understand that the job protection provided me expires after 12 weeks of leave.

The Leave Agreement signed by Hicks also states that:

> I understand that a breach of any of these terms may result in the reclassification of this leave as unauthorized, or not subject to the terms of the FMLA, and/or may result in disciplinary action, up to and including the termination of any continued employment.

Jt. App. 218-219.

When Hicks did not return to work on October 31, 1995, or contact Sterling with information regarding her status, Sterling on several occasions attempted to contact her, but was unsuccessful. Jt. App. 70-73. By letter dated November 14, 1995, Sterling notified Hicks of its intent to process her

resignation for failure to either return to work or to contact Sterling with a date when she would be able to return to work. Jt. App. 78. Hicks took no action to return to work. Jt. App. 71. Thus, effective November 14, 1995, Sterling terminated her employment.

On or about November 15, 1995, Hicks filed a claim for unemployment compensation benefits. Jt. App. 75. There were several unemployment compensation hearings, which included sworn testimony by Sterling representatives and Hicks. Jt. App. 63-75, 147-155, 205-217, 286-292. During the unemployment compensation proceedings, Hicks testified under oath that she had 12 weeks of leave and that she was medically unable to return to work at the end of her leave on October 30, 1995 due to problems with childbirth. Jt. App. 65-66, 74-75, 13. Hicks also testified that she visited her physician on December 6, 1995 and it was at that time that she was released to return to work. Jt. App. 68, 75. Because the relevant facts in the instant case have been established by Hicks's sworn testimony, in that she testified she had 12 weeks of leave and she was unable to return to work upon expiration of her leave, as a matter of law, Sterling's termination of her employment did not violate the FMLA.

The course of the proceedings in this case and disposition below are as follows. On or about July 15, 1997, Hicks filed a complaint against Sterling in the Circuit Court of Jefferson County, Commonwealth of Kentucky, seeking relief under the FMLA. Jt. App. 12-14. Upon Sterling's Notice of Removal, the case was removed to the United States District Court for the Western District of Kentucky at Louisville ("district court"). Jt. App. 3. On August 6, 1997, Sterling filed its Answer to Hicks's Complaint. Jt. App. 3.

On September 1, 1997, there was a Pre-Conference Planning Meeting, in which both parties participated, wherein it was determined that 180 days would be allotted for discovery. Although certainly permitted to do so, Hicks conducted no discovery during this time period. However, contrary to Hicks's contention in her Petition for Writ of Certiorari ("Petition") at p. 4, there was discovery conducted prior to Sterling's motion for summary judgment. Sterling obtained transcripts and documents from Hicks's unemployment compensation proceedings. Sterling utilized, in part, Hicks's sworn testimony given during her unemployment compensation hearings when it filed and re-filed its motion for summary judgment. Jt. App. 63-75, 147-155, 205-217, 286-292.

On October 6, 1997, Sterling filed a Motion for Summary Judgment. Jt. App. 3. On February 11, 1998, the district court issued a Memorandum Opinion and Order granting Sterling's Motion for Summary Judgment. Jt. App. 4, 163-167. The district court ruled that Sterling did not refuse to grant 12 weeks of leave to Hicks, nor did it discourage her from taking leave, and thus, Sterling did not violate Hicks's rights under the FMLA. Jt. App. 166-167.

Subsequently, upon consideration of Hicks's motion to alter, amend or reconsider the granting of summary judgment to Sterling, on April 3, 1998, the district court set aside summary judgment and allowed an additional 90 days for discovery on one limited issue. Jt. App. 173-176. That issue was whether Hicks voluntarily took FMLA leave from August 8, 1995 to October 31, 1995, or whether she was required to take leave at that time by her employer. Jt. App. 173-176. On June 1, 1998, the district court issued another Order allowing the parties 90 days from the date of the

June 1, 1998 Order (until August 31, 1998) in which to conduct discovery. Jt. App. 177-178.

On September 1, 1998, Sterling re-filed its Motion for Summary Judgment. Jt. App. 6. On October 22, 1998, the district court again granted Sterling's Motion for Summary Judgment, dismissing the action with prejudice. Jt. App. 19-22, 23. The district court found that it was irrelevant whether Hicks requested to be placed on FMLA leave or whether Sterling placed her on FMLA leave because under the FMLA, Sterling was not prohibited from placing Hicks on FMLA leave. Jt. App. 22.

On or about November 20, 1998, Hicks filed an appeal to the United States Court of Appeals for the Sixth Circuit ("Court of Appeals"). After submission of briefs and oral argument, on July 17, 2000, the Court of Appeals issued its opinion affirming the district court's order granting summary judgment for Sterling. Pet. App. 2a.[2] The Court of Appeals ruled that it was not necessary to address whether Sterling could place Hicks on FMLA leave "because Hicks's failure to return to work within 12 weeks of even her proposed leave date[3] precludes recovery under the Act." On July 28, 2000, Hicks filed a petition for panel rehearing. On August 22, 2000, the Court of Appeals denied Hicks's petition for panel rehearing. Hicks now petitions for writ of certiorari.

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2. All citations to Pet. App. __ are references to the Appendix contained in Hicks's Petition for Writ of Certiorari.

3. Throughout this case, Hicks has asserted that her leave should have begun on September 4, 1995, the date of her baby's birth. However, as the Court of Appeals correctly ruled, even beginning Hicks's leave on her proposed date she still could not have returned to work at the end of 12 weeks.

REASONS FOR DENYING THE WRIT

I. Considerations Governing Review On Writ Of Certiorari

This case is not one in which certiorari should be granted. The instant action does not meet any of the general criteria set forth in SUP. CT. R. 10. "A petition for writ of certiorari will be granted only for compelling reasons." *Id.* Further, a "petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or misapplication of a properly stated rule of law." *Id.* Hicks's Petition is based on the arguments that the Court of Appeals supplied facts and made erroneous factual findings and that there is an important principle of law at issue.

First, Hicks contends that the courts below supplied facts from evidence not specifically listed in FED. R. CIV. P. 56. ("Rule 56"). The argument is meritless because it is contrary to law. (See discussion *infra* at pp. 9-10). Hicks contends that by supplying facts, the Court of Appeals made erroneous factual findings, apparently because the court did not adopt her version of the facts. (Petition, p. 6). However, Hicks's version of the facts is not supported by the evidence of record. To the contrary, the material facts as set forth by Sterling are supported by the evidence of record, and the courts below so ruled. Most importantly, even if there were erroneous factual findings, which there were not, such is not a basis on which certiorari should be granted. A writ of certiorari will not be granted to review evidence or inferences drawn from the evidence. *General Talking Pictures Corp. v. W. Elec. Co.*, 304 U.S. 175 (1938). The decision by the Court of Appeals is not to be disturbed unless plainly without support. *United States v. Chem. Found.*, 272 U.S. 1 (1926). Certiorari

should be denied when the decision of the Court of Appeals is a fair assessment of the record because the Supreme Court does not grant a writ of certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220 (1925).

Second, the principle that under the FMLA an employer may place an employee on FMLA leave is a principle supported by the FMLA regulations, case law and the United States Department of Labor. Although Hicks argues that an employer may not place an employee on FMLA leave, she does not supply any legal authority to support her argument. Rather, Hicks argues this is an "important issue" and references a law review article. This Court does not sit to satisfy a scholarly interest in issues or sit for the benefit of particular litigants. *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70 (1955). Because the Court of Appeals concluded it was unnecessary to do so, the principle was not applied by that court. More importantly, even if the Court of Appeals had applied the principle, an asserted misapplication of a stated rule of law is not a reason for granting a writ of certiorari.

This case also does not meet any of the specific criteria set forth in SUP. CT. R. 10(a-c). The Court of Appeals has not entered a decision in conflict with a decision of another United States court of appeals. SUP. CT. R. 10(a). A decision by a state court of last resort is not involved. SUP. CT. R. 10(b). Nor does this case involve the situation where the Court of Appeals has decided an important question of federal law that has not been, but should be, decided by this Court, or has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10(c). Hicks's arguments are not compelling reasons for which a petition for writ of certiorari

should be granted, because they are contrary to law, and contrary to the considerations governing review on certiorari. Accordingly, applying the governing considerations for granting a petition for writ of certiorari to Hicks's Petition, it is clear that the Petition should be denied.

II. The Courts Below Properly Granted Summary Judgment For Sterling Based On The Summary Judgment Standard, Permissible Evidence, And The Law

A. The Summary Judgment Standard

Celotex Corp. v. Catrett, 477 U.S. 317 (1986), establishes the respective burdens of proof between a party moving for summary judgment and the non-movant. The movant has the initial burden of showing the absence of a genuine issue of material fact, but the movant is not required to support its motion with affidavits or other materials negating the non-moving party's claim. *Id.* at 323. However, the non-moving party must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* at 324.

When a motion for summary judgment is made and supported as provided by Rule 56, an adverse party may not rest on the mere allegations or denial of the pleadings, but the adverse party's response by affidavits or otherwise provided by Rule 56 must set forth specific facts showing that there is a genuine issue for trial. *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146 (6th Cir. 1995). If the adverse party does not so respond, summary judgment shall be entered against her. Hicks did not present affirmative evidence of

record to support her factual allegations. Thus, she could not defeat Sterling's Motion for Summary Judgment, and the courts below so properly ruled.

B. Permissible Evidence Under The Summary Judgment Standard

Hicks argues that the courts below improperly supplied facts from evidence not included in the forms of evidence set out in Rule 56. Hicks also contends that the Court of Appeals supplied facts which are contrary to her version of the facts. (Petition, p. 6). Hicks specifically asserts that the Court of Appeals improperly made factual findings based on excerpts from transcripts of Hicks's testimony given during the unemployment compensation proceedings. The argument is legally incorrect. The forms of evidence noted in Rule 56 are not the exclusive ways for presenting evidence in a summary judgment proceeding. *Duffee By and Through Thornton v. Murray Ohio Mfg. Co.*, 896 F. Supp. 1071 (D. Kan. 1995). *See also* 10A Wright, Miller & Kane, Federal Practice And Procedure: Civil 3d § 2721, *et seq.* at 361 (1998). There are a variety of materials not expressly mentioned in Rule 56 that a federal court may consider on a summary judgment motion. *Id.* § 2724.

In *Duffee*, the Court held that a sworn statement was proper material on which a court may base the granting of summary judgment. Likewise, in *Reed v. Aetna Cas. & Sur. Co.*, 160 F.R.D. 572 (N.D. Ind. 1995), the Court ruled that a sworn statement was admissible as summary judgment evidence. The Court in *Reed* explained that particular forms of evidence listed in Rule 56 are not the exclusive means of presenting evidence to support a summary judgment motion. The court stated that a "court may consider any material

that would be admissible or useable at trial." *Id.* at 574. *See also Horta v. Sullivan* 4 F.3d 2 (1st Cir. 1993) (in addition to those items listed in Rule 56(c) a court may take into account any material that would be admissible or useable at trial); *Curnow By and Through Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991) (in deciding a Rule 56(c) motion, the district court properly considered a statement because the statement was given under oath).

In sworn testimony during the unemployment compensation proceedings, Hicks admitted that she took the 12 weeks of leave and at the end of the 12 weeks of leave, she was medically unable to return to her position with Sterling. Jt. App. 65-68. She also testified that she was not released by her physician to return to work until December 6, 1995. Jt. App. 75. The law is clear that under Rule 56, Hicks's sworn statements are permissible factual evidence on which to base summary judgment. Accordingly, the Court of Appeals did not "supply facts from documents not included in Rule 56" as Hicks contends. To the contrary, the Court of Appeals properly relied on Hicks's sworn testimony in its decision to affirm summary judgment for Sterling.

C. The Law

1. FMLA Leave Entitlement

Under the FMLA, an eligible employee working for a covered employer is entitled only to a *total* of 12 workweeks of leave during any 12-month period for *one or more* of the following:

> (A) *Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.*

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) *Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.* [Emphasis added].

29 U.S.C. § 2612(a)(1).

The applicable regulation states that an "eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12 month period for any one or more" of the qualifying reasons. 29 C.F.R. § 825.200(a). *See also Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238, 242 (E.D. Pa. 1994) (under the FMLA, an eligible employee is entitled to a *total* of 12 workweeks of leave during any 12-month period for *one or more* of the qualifying reasons); *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1034 (M.D. Tenn. 1995) (the FMLA establishes the right of an eligible employee to take *up to* 12 weeks of leave during a 12-month period for *one or more* of the qualifying events). As a matter of law, an employee entitled to leave under the FMLA is limited to a total of 12 weeks of leave for a combination of any of the qualifying reasons provided for under the Act.

Under the FMLA, upon return from leave, whether utilizing a portion or the entire 12 weeks of leave,

an employee is entitled to be returned to the same position the employee held when leave began or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment. 29 U.S.C. § 2614(a)(1); 29 C.F.R. § 825.214(a). The applicable regulation provides that "if the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuance of a serious health condition, the employee has no right to restoration to another position under the FMLA." 29 C.F.R. § 825.214(b). Hicks admitted that she was granted 12 weeks of leave. Jt. App. 67. During the unemployment compensation hearing, Hicks testified that ". . . I had a 12-week leave." Jt. App. 67. As such, Hicks was not entitled to any additional FMLA leave. Hicks also testified that she was not medically able to return to work until December 6, 1995. Jt. App. 68, 75. By that time, her entitlement to leave had ended along with her entitlement to job restoration.

Federal courts have granted summary judgment in cases with facts analogous to the facts in the instant action. In *Cormier v. Littlefield*, 112 F. Supp.2d 196 (D. Mass. 2000), the court ruled that the employer was not required under the FMLA to hold open an employee's position beyond the 12 weeks of FMLA leave when at the end of the leave, the employee was unable to return to work. Relying upon the applicable FMLA regulation, 29 C.F.R. § 825.214(b), the court granted the employer's motion for summary judgment because after 12 weeks of leave the employee was not released by his physician to return to work. The court found that the employee was discharged on January 9, 1997, and that he was not released to return to work until January 27, 1997, several weeks beyond the 12 week period. Thus, the court ruled that the employee did not have a viable

FMLA claim against the employer. *See also Voskuil v. Envtl. Health Center-Dallas*, No. 3:96-CV-0683-D, 1997 WL 527309 (N.D. Tex. 1997) (because the former employee could not produce evidence that she was capable of performing her job at the end of her leave, she had no right to restoration to another position and she could not resume her former position, thus her job restoration rights under the FMLA ceased upon the expiration of her leave); *Beckendorf v. Shwegmann Giant Super Markets, Inc.*, No. 95-3822, 4 Wage and Hour Cas. 2d (BNA) 315, 1997 WL 191504 (E.D. La. 1997) (when an employee, at the conclusion of 12 weeks of FMLA leave, is unable to perform her job because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to a position under the FMLA).

Applying the statute, regulations and analogous case law to Hicks's situation, where it is established, via Hicks's own testimony, that she used her total 12 weeks of FMLA leave entitlement and was medically unable to return to her position at the end of her leave, it is clear, as a matter of law, that Hicks had no right to job restoration under the FMLA.

2. Hicks Misapplies The FMLA Cases Cited In The Petition

The FMLA cases cited by Hicks to support her position are distinguishable from the instant action. The employee in *Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591 (7th Cir. 1998), was terminated (for poor job performance) several days after she requested a leave. Thus, the factual situation in that case is in sharp contrast to Hicks's case because Hicks received a full 12 weeks of leave and was terminated when she was unable to return to work after

expiration of her leave. The employee in *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294 (4th Cir. 1998), returned to work prior to the expiration of his leave and the court found that the employer failed to restore him to his prior position. Again, the factual situation in that case is in contrast to Hicks's situation where the evidence establishes that Hicks could not return to work upon the expiration of her leave.

Hicks argues that her case is distinguishable from *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1998). Hicks is incorrect. In its opinion, the Court of Appeals cited *Cehrs* for the principle that the employer in that case did not violate the FMLA because the employee was unable to return to work within the 12 week FMLA leave period. The court in *Cehrs* explained that regardless of the proposed leave dates by the employer or the employee, the employee was clearly unable to return to work using either date. In Hicks's situation, the Court of Appeals found the facts and ruling of *Cehrs* highly analogous, because even if Hicks began her leave on her proposed date, September 4, 1995, her leave would have ended the last week of November 1995, which was, by her own testimony, at least ten days before her physician released her to return to work.

3. Hicks Cannot Disavow Her Sworn Testimony By Asserting Collateral Estoppel Or By Attempting To Change Her Testimony

In her Petition, Hicks cites several cases to discuss the doctrine of collateral estoppel. Hicks argues that she is not collaterally estopped from raising factual issues in this case which were also raised in the unemployment compensation proceedings. (Petition, p. 8). Collateral estoppel is not a

relevant principle in this case.[4] The "*findings*" of the Unemployment Compensation Commission are not on review, nor have the findings ever been relied upon.[5] It is Hicks's sworn testimony given in the unemployment compensation proceedings that is being relied upon. The relevant legal principle is that Hicks cannot create issues of fact to defeat summary judgment by relating facts in contradiction of her previously sworn testimony. *Davidson & Jones Dev. Co. v. Elmore Dev. Co.*, 921 F.2d 1343, 1352 (6th Cir. 1991); *Reid v. Sears, Roebuck and Co.*, 790 F.2d 453, 460 (6th Cir. 1986). *See also Essick v. Yellow Freight Sys., Inc.*, 965 F.2d 334 (7th Cir. 1992) (former employee, in lawsuit against former employer, could not defeat summary judgment by contradicting his own prior sworn testimony given during administrative proceedings); *Margo v. Weiss*, 213 F.3d 55 (2d Cir. 2000) (a motion for summary judgment cannot be defeated with affidavits in contradiction of earlier testimony). Hicks has throughout this case attempted to change her factual story in contradiction of her previously sworn testimony given during the unemployment compensation proceedings. The courts below have properly used Hicks's sworn testimony for summary judgment purposes — the "*findings*" in the unemployment

4. Collateral estoppel is a principle that refers to issues and findings of fact, not sworn testimony. As applied to the instant action, the findings of fact entered in Hicks's unemployment compensation proceedings do not collaterally estop litigation of the issues in this case. *Bd. of Educ. v. Gray*, 806 S.W. 2d 400 (Ky. App. 1991). However, the principle does not apply to Hicks's sworn testimony.

5. In its February 11, 1998 Opinion and Order, the district court stated that there is no need to consider the doctrine of collateral estoppel, and as such, the court did not apply the doctrine. Subsequently, the doctrine was not applied by the district court or the Court of Appeals.

compensation proceeding have never been used, nor could such "findings" be used. Hicks states such in her Petition (at pp. 12-13), but, nonetheless, attempts to use the findings to support her argument. The references to the unemployment compensation proceedings Hicks cites in her Petition, except for one reference, are not to her testimony. Rather, Hicks references the referee's questions and the referee's and commission's "findings." The only reference to Hicks's testimony is the excerpt in her Petition on p. 11, where she admits she was not released to return to work by her physician until December 6, 1995. Application of the doctrine of collateral estoppel is simply not relevant to this case.

Hicks further asserts that her sworn testimony given during the unemployment compensation proceedings was for one purpose, which was for obtaining unemployment compensation benefits. (Petition, p. 13). Hicks's contention, taken to its logical conclusion, appears to assert that her testimony given under oath during the unemployment compensation hearing was given to suit that purpose. However, when needed to provide the facts for this case, her factual story would be different. Hicks appears to be arguing that her factual story may change to establish whatever facts are necessary to support her present claim. Her attempts to create facts to suit her need demonstrates the lack of evidence in the record to support her allegations.

Hicks further contends that there is nothing in her medical records which indicates that she was unable to return to work before December 6, 1995. (Petition, p. 10). More important is the fact that there is nothing in the medical records which indicates that Hicks could have reported to work prior to December 6, 1995. The mere inference of an issue of fact will not defeat a summary judgment motion.

Celotex. Rather, Hicks must have demonstrated, by affirmative evidence of record, that issues of material fact existed. She failed to do so. Her attempts to create issues of fact are in contradiction of her previously sworn testimony. Her latest assertion is that a jury could find that she answered a different question from the one the referee asked regarding the date she was released to return to work (Petition, p. 13). The assertions are directly contrary to the standard for granting summary judgment. Moreover, such assertions are not reasons for which this Court should grant review of the case.

III. An Employer May Place An Employee On FMLA Leave

A. The Principle Is Legally Valid

The principle that an employer may place an employee on FMLA leave is a principle supported in the FMLA regulations, case law and by the United States Department of Labor. Although disavowing the principle, Hicks offers no legal support for her argument. Rather, she references a theoretical law review article on the Pregnancy Discrimination Act.[6] The article, in presenting an academic review, actually supports the Court of Appeals ruling in that the article correctly states that the FMLA provides only 12 weeks of leave.

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6. Hicks's reference to the Pregnancy Discrimination Act is not appropriate. The Pregnancy Discrimination Act has never been asserted in this case. A contention not made in the district court or in the Court of Appeals will not be considered by the United States Supreme Court. *Virtue v. Creamery Package Mfg. Co.*, 227 U.S. 8 (1913); *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

More importantly, whether an employer may place an employee on FMLA leave was not addressed by the Court of Appeals because the court found it unnecessary to do so. Even if the principle had been addressed, the principle is legally valid. As such, it is one which should not be reviewed by this Court. Sterling could not locate any cases which are in conflict with the principle. Thus, it is not "an important issue which needs to be settled by this court," as Hicks asserts in her Petition. (Petition, p. 17). Nonetheless, the principle is reviewed below.

In *Love v. City of Dallas*, No. 3:96-CV-0532-R, 1997 U.S. Dist. LEXIS 21982 (N.D. Tex. 1997), employees sued their employer asserting violations of the FMLA, because their employer "involuntarily" placed them on FMLA leave without their request. The employees in *Love* claimed that nothing in the text of the statute or regulations allows an employer to involuntarily place an employee on unpaid FMLA leave. The court in *Love* stated that "more relevantly, nothing in the statute prohibits an employer from doing so." *Id.* at *17. The court ruled that there is nothing in the FMLA statute itself or the regulations to prohibit an employer from placing employees on FMLA leave during the first 12 weeks of leave. Accordingly, the court granted summary judgment in favor of the employer and dismissed the employees' FMLA claims.

Harvender v. Norton Co., No. 96-CV-653, 1997 U.S. Dist. LEXIS 21467, 4 Wage and Hour Cas. 2d (BNA) 560 (N.D. N.Y. 1997), is another case with the same holding as in *Love*. In *Harvender*, the employee became pregnant and was told by her physician that her due date was in late September 1996. The employee informed the employer that she was pregnant and notified her supervisor of her baby's

due date. The employee's physician advised her that she should not be working with chemicals which was a primary part of her job. The employee believed that she would be placed on a light duty program by the employer as she had been during a previous pregnancy. However, when the employer notified the employee that she was being placed on 12 weeks of FMLA leave, the employee protested claiming that she never requested the leave and objected to being placed on FMLA leave.

The *Harvender* court ruled that "there is no right under the FMLA to bring an action against an employer for placing an eligible employee on leave." *Id.* at *16. Although the employee argued that she did not request to be placed on FMLA leave, the court ruled that such an argument by the employee was irrelevant. The court stated that "the Act does not require a request by an employee in order for that employee to be placed on FMLA leave." *Id.* at *22. The court further stated that "nowhere in the Act does it provide that FMLA leave must be granted only when the employee wishes it to be granted." *Id.* at *21. The court held that the employer provided the requisite 12 weeks of leave and was not obligated to provide anything else under the Act. Accordingly, the court in *Harvender* granted the employer's motion for summary judgment and dismissed the employee's FMLA claim. *See also Moss v. Formosa Plastics Corp.*, 99 F. Supp.2d 737 (M.D. La. 2000) (the court ruled that the employer's placing the employee on leave did not violate the FMLA statute or regulations, thus, the employer was entitled to summary judgment as a matter of law on the employee's FMLA claim).

In addition to the applicable case law, the United States Department of Labor has issued several FMLA opinion

letters wherein the Department of Labor has unequivocally stated that an employer may designate and count an absence against the employee's 12 week FMLA leave entitlement even if the employee has not requested that it be counted as such. *See* Department of Labor Opinion Letter – 83, August 7, 1996 (the employee may not "bar" the employer from designating any qualifying absence as FMLA leave); Department of Labor Opinion Letter – 68, July 21, 1995 (the employer may designate, and so advise the employee, and count an absence against the employee's 12 weeks of FMLA leave entitlement even if the employee has not requested that it be counted as such). Jt. App. 281-283, 284-285.

Hicks argues that her leave should have begun only on the date she proposed, September 4, 1995, to care for her newborn child.[7] Hicks is incorrect. As a matter of law, Sterling was not prohibited from designating Hicks's leave as FMLA leave when she notified Sterling on August 8, 1995, that she was hospitalized for a kidney infection. Hicks did not submit to Sterling any documentation that she was able to return to work following her hospitalization, nor did she return to work. The Court of Appeals found that the record was devoid of such evidence. Pet. App. 3a. Most importantly, Hicks's testimony confirms the dates of her leave. She testified that she began leave on August 8, 1995, and was not released by her physician to return to work until December 6, 1995. Jt. App. 65-66, 68, 74-75.

The plaintiffs in *Love* were placed on FMLA leave because they were unable to perform their jobs. At no time

7. Hicks asserts in her Petition (p. 6) that her baby was born on September 5, 1995. However, her Complaint (Pet. App. 40a) and her Affidavit (Pet. App. 37a) state that her baby's birthdate is September 4, 1995.

subsequent to Hicks's hospitalization did Hicks make any attempt to return to work. She testified that her leave commenced August 8, 1995, and that she was unable to return to work until December 6, 1995. Jt. App. 65-66, 68, 74-75. Applying the case law and Department of Labor opinion letters to the instant action, it is clear that Sterling was permitted to designate Hicks's leave as FMLA leave.

B. The Court Of Appeals Correctly Ruled That It Was Unnecessary To Address The Principle

The Court of Appeals concluded that regardless of whether the leave date proposed by Hicks or Sterling applied, using either date, Hicks's failure to return to work before December 6, 1995 precluded recovery under the FMLA. Thus, the Court did not address Sterling's right to place Hicks on FMLA leave. Hicks has asserted throughout this case that her FMLA leave should have begun on September 4, 1995, the date of her child's birth. Jt. App. 103-104. Assuming *arguendo* that Hicks had the right to choose the date of her FMLA leave (which she does not, as a matter of law), beginning the leave on September 4, 1995, her 12 weeks of FMLA leave entitlement ended on November 24, 1995. Hicks has admitted she was unable to return to work at that time. Jt. App. 65-66, 68, 74-75. Even assuming Hicks's FMLA leave did not begin until September 11, 1995, the date of Sterling's letter, she still used 12 weeks of FMLA leave prior to December 6, 1995, the time she was released by her physician to return to work. Jt. App. 65-66, 68, 74-75. Beginning Hicks's leave from September 11, 1995 and counting 12 weeks forward, her FMLA leave expired on December 1, 1995. Thus, counting Hicks's FMLA leave from the beginning date she proposes, September 4, 1995, or at

the very latest from the date of the September 11, 1995 letter, Hicks still used all of the 12 week FMLA leave entitlement and could not return to work upon expiration of the leave.

As such, Hicks's argument that an employer may not place an employee on FMLA leave is not a decisive legal issue in this case. The decisive legal issue, as correctly determined by the Court of Appeals, is that Hicks used all of the 12 week FMLA leave entitlement and could not return to work upon expiration of that leave. Hicks's FMLA job protection ended when she could not return to work on October 31, 1995. Even assuming *arguendo* the FMLA leave began on September 5 [sic], 1995 as she asserts, Hicks's 12 week FMLA leave expired before she was released by her physician to return to work. No matter what extraneous arguments Hicks attempts to make, she cannot change the law. Twelve weeks of FMLA leave entitlement is just that, 12 weeks. Accordingly, this case raises no significant issues that warrant this Court's review.

CONCLUSION

Based upon the foregoing discussion, Sterling respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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